1990

E-Systems, Inc., Montek Division v. Hazeltine Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

E-SYSTEMS, INC./MONTEK DIVISION	)	
	)	
Plaintiff and Appellant,	)	BRIEF OF APPELLANT
	)	
v.	)	No. 900053
	)	
HAZELTINE CORPORATION,	)	
	)	
Defendant and Respondent.	)	

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I. JURISDICTION

This Court has jurisdiction over this appeal from a final order of the Third Judicial District Court of Salt Lake County pursuant to § 78-2-2 (3)(j) Utah Code Ann. (1953).

II. STATEMENT OF THE CASE

The action below concerned Hazeltine Corporation's bad faith breach of a teaming agreement and subcontract with E-Systems, Inc./Montek Division ("E-Systems"), under which E-Systems was to provide Precision Distance Measurement Equipment ("DME/P"), a subcomponent for a next-generation landing system being developed by Hazeltine Corporation ("Hazeltine") for the Federal Aviation Administration ("FAA"). Hazeltine forced E-Systems to implement out-of-scope design changes to the DME/P, and then prejudiced E-Systems' ability to recover the costs of those changes under the administrative appeals procedure contemplated by the subcontract. Hazeltine hindered E-Systems' work on the subcontract by refusing to provide testing assistance and other support required by E-Systems to complete the DME/P. Then, Hazeltine simply walked away from its obligations under both the subcontract and teaming agreement.

Instead of allowing E-Systems to proceed on its breach claims and claims based upon Hazeltine's bad faith conduct, the Court below misconstrued a "Disputes" clause in the subcontract to require that E-Systems pursue an inapplicable, inadequate, and time-consuming administrative appeal with the FAA as a pre-requisite to E-Systems' instituting any suit in Utah against

Hazeltine. That Disputes Clause has a limited purpose and expressly does not apply to breaches of the subcontract or disputes solely between Hazeltine and E-Systems. Moreover, the Disputes clause was wrongly invoked because it cannot sufficiently remedy E-Systems' claims against Hazeltine. Even if the court was correct to require E-Systems to first pursue this administrative procedure of the Disputes Clause -- which it clearly was not -- the court improperly selected to dismiss instead of to stay E-Systems' action in Utah pending exhaustion of that administrative appeals procedure. In granting the defendant's motion to dismiss and, in the alternative, motion for summary judgment, the Court improperly denied E-Systems its rightful choice of forum in the Utah courts.

III. ISSUES PRESENTED

1. Did the Court below err in holding, as a matter of law, that "the Disputes Clause of the Subcontract requires that the claims, causes of action and counts set forth in E-Systems' complaint be resolved in accordance with the procedures and provisions of subparagraphs (b) through (e) thereof"?

   A. Do the procedures at subparagraphs (b) through (e) of the Subcontract Disputes Clause apply to E-Systems' claims for bad faith and breach of the Subcontract which do not, by definition, "arise under" the Subcontract?

   B. Did the Court below err in holding, as a matter of law, that "The language of the Disputes Clause of the Subcontract is complete, clear, unambiguous and not

subject to interpretation" so as to exclude parol evidence as to the meaning of that clause?

C. Do the procedures at subparagraphs (b) through (e) of the Subcontract Disputes Clause, which rely on the "remedy-granting" provisions in the Subcontract, afford E-Sytems complete relief for its claims as set forth in its complaint?

D. Do the procedures at subparagraphs (b) through (e) of the Subcontract Disputes Clause apply to disputes solely between Hazeltine and E-Systems that are not the result of actions of the FAA and therefore not subject to appeal to the FAA, including but not limited to: (1) that portion of E-Systems' claims against Hazeltine that Hazeltine refused to certify to the FAA Contracting Officer pursuant to the Subcontract Disputes Clause and (2) E-Systems' claims alleging breach of the Teaming Agreement, even though the Teaming Agreement is an independent contract that has no Disputes Clause, does not contain any other provision purporting to require that disputes relating to the Teaming Agreement be resolved in any predetermined manner, and does not expressly or impliedly incorporate the Subcontract Disputes Clause?

2. Did the Court below err in holding, as a matter of law, that "The Disputes Clause of the Subcontract has not been rendered useless and does not fail of its essential purpose"?

3. Did the Court below err in failing to stay the action below, so as to preserve E-Systems' choice of forum, as opposed to granting the defendant's motion to dismiss and, in the alternative, motion for summary judgment?

IV. STANDARD OF APPELLATE REVIEW

Issues 1 and 2 address conclusions of law, which are reviewed de novo for correctness without any special deference to the trial court. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987); Bailey v. Call, 100 Utah Adv. Rep. 11, 767 P.2d 138 (Ct. App.), cert. denied, 773 P.2d 45 (1989). This "correction of error" standard of review applies to orders granting summary judgment as well as orders to dismiss. See, e.g., Barber v. Farmers Ins. Exch., 751 P.2d 248 (Utah Ct. App. 1988) (summary judgment is granted as a matter of law rather than fact; reviewing court is free to reappraise the trial court's legal conclusions). Issue 3, concerning failure to stay proceedings below, is subject to Rule 30(a) of the Utah Rules of Appellate procedure, which addresses an appellate court's inherent power to modify, as appropriate, an erroneous order.

V. RELEVANT FACTS

Two years ago, Hazeltine Corporation walked away from a government contract with the FAA for the development and installation of a next-generation airport landing system called a Microwave Landing System ("MLS") at various airports across the United States. Record at 12-13 (Complaint ¶¶ 24-27). At first,

Hazeltine stopped work on that contract under the guise of an unauthorized "study period"; then, Hazeltine informed the FAA that it considered its contract breached by the FAA and simply stopped working. Record at 11 (Complaint ¶ 22), 554 (Brimhall Affidavit ¶¶ 9, 13).

Hazeltine made this decision to stop work because the alternative of completing the contract would have forced it to swallow a huge cost overrun. The huge cash drain associated with pressing ahead was both immediate and inevitable. Although stopping work on the contract meant that the FAA would terminate its contract for default (which the FAA ultimately did on August 7, 1989), Hazeltine knew it could forestall any immediate cash loss and possibly avoid it altogether if Hazeltine could make stick its allegation of breach by the FAA.

When Hazeltine turned its back on the FAA contract, however, it also turned its back on E-Systems, its principal subcontractor. During the so-called "study period," Hazeltine attempted to maintain the pretense of an on-going contractual relationship with E-Systems. It sent E-Systems letters instructing it to perform work that had, in fact, already been performed and suggested that E-Systems start working on other aspects of the subcontract work that were either out of sequence or inappropriate at the time. Record at 555 (Brimhall Affidavit ¶ 13). After a time, however, Hazeltine even stopped trying to maintain this facade.

For a period now approaching two years, Hazeltine has done nothing. Hazeltine has provided to E-Systems no word at all

regarding work under the subcontract, nor has it attempted to invoke any right to terminate the subcontract. 1/ Faced with this situation, E-Systems sued Hazeltine to recover its damages for breach of the subcontract and breach of the covenant of good faith and fair dealing under the subcontract.

No one could have anticipated this sad state of events back in December 7, 1982, when Hazeltine and E-Systems signed the first of two "Teaming Agreements" for the purpose of combining their technical and business resources to forge a "working relationship" that they hoped would "lead to the maximization of the sale and/or licensing of the MLS and DME/P equipments as a system throughout the world." 2/ Record at 4, 92 (Complaint ¶ 6 & Exhibit 2, Teaming Agreement at ¶ 15). Central to both Teaming Agreements was a requirement that Hazeltine include E-Systems in all key discussions with the FAA relevant to E-Systems' product. Record at 24-25, 86 (Complaint, Exhibit 1 (1985 Teaming Agreement ¶ 4)

1/ Hazeltine has asserted that the Prime Contract has been terminated for convenience by the FAA. Record at 674 (Hazeltine's Reply Brief, Exhibit 1, Hazeltine Complaint ¶ 186 ("The default termination should be converted to a termination for convenience entitling Hazeltine to recover its costs plus profit in accordance with the termination for convenience clause.")). If that is the case, however, Hazeltine is obligated to terminate E-Systems for convenience under the Subcontract, a step it has thus far been unwilling to take. Record at 314 (Complaint, Exhibit 3, Subcontract at 110-10, "Termination for Convenience of the Government," FPR 1-8.705-1, June 1964 (contractor must "terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination")). Failure to take action under this clause is a breach of the Subcontract.

2/ The quotation is contained in the second Teaming Agreement, signed on December 21, 1985.

and Exhibit 2 (1982 Teaming Agreement ¶ 2)). Despite Hazeltine's unqualified obligation to involve E-Systems in all decisions affecting the MLS Program, over the next eight years after the formation of the Hazeltine/E-Systems "team," Hazeltine repeatedly breached this obligation. Record at 11 (Complaint ¶¶ 22, 23), 554-55 (Brimhall Affidavit ¶ 9).

Having forged this ambitious alliance with Hazeltine, E-Systems spent the next couple of years developing, at its own expense, the DME/P component of the MLS. Record at 4-5 (Complaint ¶¶ 6-8). The parties agreed that this advance development effort would give the Hazeltine/E-Systems team an advantage in competing for the FAA contract. Both parties also fully understood that the design resulting from E-Systems' pre-contract work would be the basis for the technical and price proposals for the DME/P portion of the MLS to be supplied under contract to the FAA. Record at 5-6, 8 (Complaint ¶¶ 8-10, 16), 552-54 (Brimhall Affidavit ¶¶ 3, 7). By January 12, 1984, when the FAA awarded to Hazeltine Contract DTFA01-84-C-0008 (the "Prime Contract") for the delivery of 178 Microwave Landing Systems, E-Systems' design of the DME/P was essentially complete. Record at 6-7 (Complaint ¶¶ 10-12, 15), 552 (Brimhall Affidavit ¶ 3).

After receiving the award of the Prime Contract, Hazeltine sent E-Systems a telex, dated January 31, 1984, authorizing E-Systems to proceed with work. Record at 7 (Complaint ¶ 12). E-Systems performed under this telex authorization until December 21, 1985, when Hazeltine and E-Systems executed Subcontract No.

K25213 (the "Subcontract"). Record at 7 (Complaint ¶ 13). Along with the Subcontract, the parties, anticipating a potential worldwide market of 2,600 DME/P Systems, signed a new Teaming Agreement governing the current MLS effort as well as any follow-on awards or enlargements of the Prime Contract. Record at 7 (Complaint ¶ 13), 554 (Brimhall Affidavit ¶ 6).

The Subcontract contained a clause entitled "Article XXXVIII Disputes" ("Subcontract Disputes Clause") setting forth the procedure to be used in resolving certain disputes between Hazeltine and E-Systems. Record at 345 (Complaint, Exhibit 3, Subcontract at 112). At the time the Subcontract Disputes Clause was negotiated, the parties understood that the clause was to apply only to claims related to in-scope changes and not outright breaches of the Subcontract. Record at 553 (Brimhall Affidavit ¶ 5), 579-80 (Hopkins Affidavit ¶¶ 2, 3). For in-scope changes, the Subcontract Disputes Clause contains an administrative appeals process that involves review of certain subcontractor claims by the FAA Contracting Officer, who will render a final decision (subject to appeal) on whether or not the FAA will accept ultimate liability for the claim. This process presumes that Hazeltine will submit to the FAA Contracting Officer only E-Systems' claims based upon FAA actions that affected Hazeltine's Prime Contract that, in turn, affected E-Systems' work under the Subcontract. Record at 579-80 (Hopkins Affidavit ¶ 3). The parties agreed that all other disputes, i.e., those concerning Subcontract breaches and claims not based upon FAA actions, would be decided

by a court of competent jurisdiction. Record at 553 (Brimhall Affidavit ¶ 5), 579-80 (Hopkins Affidavit ¶¶ 2, 3).

Hazeltine and the FAA wasted no time in imposing upon E-Systems a series of major design changes to the DME/P. These changes constituted a breach of the Subcontract because they were so pervasive that they changed the fundamental character of E-Systems' original design for the DME/P. Record at 9 (Complaint ¶ 17), 554 (Brimhall Affidavit ¶ 7). To accommodate these changes, E-Systems was forced to scrap its pre-Subcontract investment in the original design of the DME/P and incur enormous redesign expenses ("nonrecurring" costs) that were not contemplated by the parties when the Subcontract was formed. Record at 9-10 (Complaint ¶¶ 18-21). These changes also precipitated additional "recurring" costs, i.e., those costs associated with manufacturing each DME/P. Record at 10 (Complaint ¶ 20).

Hazeltine added to the time and expense of performing the Subcontract by failing to provide agreed upon support to E-Systems. From June 1988 on, Hazeltine unreasonably withheld approval of First Article Test procedures, failed to make Hazeltine's inspectors reasonably available to witness required testing of the DME/P equipment, and generally failed to provide other support necessary for E-Systems to perform the Subcontract. Record at 12-13 (Complaint ¶¶ 24, 25), 555 (Brimhall Affidavit ¶ 10). This lack of cooperation was totally unjustified, was not a result of any action by or encouragement from the FAA, and was not due to any action or failure to act on the part of E-Systems.

In August 1988, Hazeltine unilaterally declared, over the FAA's strong protest, the unauthorized "study period" mentioned above. Record at 11 (Complaint ¶ 22), 554 (Brimhall Affidavit ¶ 8). Initially, this "study period" was nothing more than a ploy to pressure the FAA into re-negotiating a portion of the Prime Contract known as the "turnkey" effort involving actual installation of the MLS at various airports. (E-Systems was not involved in the "turnkey" effort and thus could not possibly benefit from the "study period" ploy.) It was during this so-called "study period" that Hazeltine attempted to disguise the delay it had imposed on E-Systems by directing it to perform tasks that were already complete or inappropriate to that stage of the program. Record at 13-14 (Complaint ¶¶ 25-27), 555-56 (Brimhall Affidavit ¶ 13) Also during this "study period," Hazeltine, without involving or even informing E-Systems, negotiated with the FAA regarding restructuring the overall performance obligations of the Prime Contract, despite the fact that the negotiations clearly affected E-Systems' obligations and the fact that failure to include E-Systems in such discussions violated the Teaming Agreement. Record at 11 (Complaint ¶¶ 22, 23), 554-55 (Brimhall Affidavit ¶ 9).

As the relationship between the FAA and Hazeltine continued to deteriorate, Hazeltine became increasingly less cooperative with its subcontractor E-Systems. Hazeltine's recalcitrance became quite pronounced beginning November 30, 1988, the date on which E-Systems submitted to Hazeltine its first claim for

equitable adjustment seeking an additional $5,000,000 for non-recurring costs associated with the massive design changes to the DME/P. Record at 10 (Complaint ¶ 21), 556-57 (Brimhall Affidavit ¶¶ 14, 15).

Hazeltine had instructed E-Systems to prepare its claims under the Subcontract on the basis of filing a joint Hazeltine/E-Systems request to the FAA for a price adjustment. Hazeltine, during the same period, however, secretly negotiated with the FAA and signed, without E-Systems' knowledge or consent, a Memorandum of Understanding ("MOU"), dated December 7, 1988, which specifically excluded E-Systems' claims from those claims that Hazeltine intended to submit to the FAA under the Prime Contract. Record at 11-12 (Complaint ¶¶ 22, 23). Hazeltine's failure to include E-Systems in the negotiations leading to the Memorandum of Understanding violated the Teaming Agreement provision requiring E-Systems to be included in important discussions with the FAA. Record at 11 (Complaint ¶ 23). Moreover, this MOU itself was contrary to subparagraph (d) of the Subcontract Disputes Clause, which provides that Hazeltine shall not enter into any settlement or agreement with the FAA which would prejudice E-Systems' rights under the Subcontract Disputes Clause. Record at 346 (Complaint, Exhibit 3, Subcontract at 112). The MOU was also contrary to the direct representation by Hazeltine that the parties would jointly submit such claims. Having made this undisclosed agreement with the FAA, Hazeltine

then unreasonably delayed by five months the submission to the FAA of the E-Systems' non-recurring cost claims.

When Hazeltine ultimately did certify E-Systems' claims for non-recurring costs on April 20, 1989, however, Hazeltine did not pass through a significant portion of those claims, thereby admitting that these portions were due solely to Hazeltine's actions as opposed to any actions of the FAA. Record at 568-70 (E-Systems' Brief in Opposition, Exhibit A.3.). On March 19, 1990, Hazeltine again refused to submit to the FAA a portion of a subsequent E-Systems claim for recurring costs, presumably because Hazeltine did not want to attempt to attribute to the FAA the increased costs associated with that portion of E-Systems' claim. In short, by failing to pass through these claims to the FAA, Hazeltine has by its actions conceded, at least with respect that portion of E-Systems' claims, the inapplicability of the administrative appeals process of the Subcontract Disputes Clause.

Although Hazeltine had numerous opportunities to repair its relations with the FAA and continue work under the Prime Contract, 3/ it did not take any reasonable steps to avoid the FAA's decision of August 7, 1989 to terminate the Prime Contract for default.

3/ On November 16, 1988, the FAA issued Modification 0026 to the Prime Contract, which essentially excused Hazeltine's previous non-performance and imposed a much-relaxed delivery schedule. Record at 558 (Brimhall Affidavit ¶¶ 17, 18). Although E-Systems was prepared to complete Subcontract work under the new schedule, Hazeltine persisted in its refusal to perform and responded to FAA by alleging Modification 0026 was a breach of contract. Record at 558 (Brimhall Affidavit ¶ 18), 582-83 (E-Systems' Brief in Opposition, Exhibit C).

Record at 558 (Brimhall Affidavit ¶¶ 18, 19). In fact, Hazeltine failed to take any action whatsoever to avert termination, even though it knew that such a termination would seriously impair E-Systems' opportunity to receive payment for its work under the Subcontract and to recover under the Subcontract Disputes Clause on its pending claims for recurring and nonrecurring costs.

Based upon the foregoing litany of bad faith acts and Hazeltine's deliberate abandonment of the Subcontract, E-Systems sued Hazeltine in Utah court for breach of the Subcontract, breach of the Teaming Agreement, and breach of the implied covenant of good faith and fair dealing contained in both the Subcontract and the Teaming Agreement.

The Third Judicial District Court of Salt Lake County heard Hazeltine's Motions to Stay, or, in the alternative, Motion to Dismiss, or, in the alternative, Motion for Summary Judgment on E-Systems' claims, and held that the Subcontract Disputes Clause requires that the claims, causes of action and counts set forth in E-Systems' Complaint be resolved in accordance with the administrative procedures and provisions of subparagraphs (b) through (e) thereof. In addition, the Court held that: the language of the Subcontract Disputes Clause is complete, clear, unambiguous and not subject to more than one interpretation; exhaustion of the administrative appeal procedure of subparagraphs (b) through (e) of the Subcontract Disputes Clause is a condition precedent to initiation by E-Systems of any litigation against Hazeltine in the Utah courts based upon the Subcontract or Teaming

Agreement; and the Subcontract Disputes Clause had not been rendered useless and did not fail of its essential purpose.

Upon entering its Findings of Facts and Conclusions of Law, the Court granted Hazeltine's Motion to Dismiss and, in the alternative, granted Hazeltine's Motion for Summary Judgment. E-Systems filed its notice of appeal of the Court's order on February 1, 1990; and filed its Docketing Statement on February 15, 1990.

VI. SUMMARY OF LEGAL ARGUMENT

The central issue in this appeal concerns the interpretation and proper application of the Subcontract Disputes Clause. That clause contemplates that certain types of disputes between Hazeltine and E-Systems under the Subcontract -- specifically, those resulting from FAA action which do not amount to a breach of the Subcontract -- will be subject to an administrative appeals procedure that is set forth in paragraphs (e) through (f) of the Subcontract Disputes Clause. All other disputes shall be heard by any court of competent jurisdiction.

The Court below misconstrued the Subcontract Disputes Clause to require that "the claims, causes of action and counts set forth in E-Systems' complaint" against Hazeltine in the Utah courts "be resolved in accordance with the procedures and provisions of subparagraphs (b) through (e) thereof." Record at 767 (conclusion of law no. 3). Contrary to the Court's conclusion, this procedure was never meant to address such concerns because it expressly does not (1) govern breaches of the Subcontract or (2) disputes not

otherwise "subject to appeal" to the FAA Contracting Officer. Moreover, the Subcontract Disputes Clause clearly was never intended to address breaches of the wholly independent Teaming Agreements.

In reaching its incorrect conclusions, the Court below improperly failed to consider the language of the Subcontract Disputes Clause in the proper context -- i.e., the field of government contracting. The Court also incorrectly invoked the parol evidence rule to preclude consideration of the evidence that E-Systems provided to show the actual intent of the parties regarding the interpretation of the Subcontract Disputes Clause.

The Court below also erred in requiring E-Systems, under any interpretation of the Subcontract Disputes Clause, to pursue an administrative appeals procedure that had "failed of its essential purpose" as a consequence of Hazeltine's bad faith abandonment of the Subcontract and its breach of the very terms of the Subcontract Disputes Clause. Assuming, arguendo, that the administrative appeals procedure applies to E-Systems claims -- which it clearly does not -- the Court below improperly denied E-Systems its rightful choice of forum by failing to stay the proceedings in Utah pending the outcome of an administrative appeal. For the foregoing reasons, the lower Court's holdings as to these conclusions of law should be reversed and its order granting Hazeltine's motion to dismiss and, in the alternative, motion for summary judgment should be vacated by this Court on appeal.

VII. LEGAL ARGUMENT

As a preliminary point, E-Systems notes that the Court below, although it was not required to do so, entered "findings of fact" to support its order granting Hazeltine's motion to dismiss pursuant to Utah Rule of Civil Procedure ("U.R.C.P") 12(b)(6) and, in the alternative, motion for summary judgment under U.R.C.P. 56 (c). Such findings are grounds for reversal if those findings of fact themselves evidence the existence of controverted and material issues of fact. See, e.g., Mountain States Tele. & Tele. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1261 (Utah 1984) (grant of summary judgment precluded where findings of fact evidenced material issues of fact). Such is clearly the case here, for E-Systems objected to numerous proposed findings of fact on the basis that they assumed controverted facts. See Record at 717-29, (E-Systems' Objections to Hazeltine's Proposed Findings of Fact and Conclusions of Law). Specifically, E-Systems denied: (1) the clear implication in several findings of fact that E-Systems at some earlier point in time had agreed with Hazeltine's present interpretation of the Subcontract Disputes Clause (Record at 718-21, objections to findings of fact nos. 6, 9, 11, & 13); (2) that Hazeltine had undertaken an "analysis" of E-Systems' claims (Record at 719-20, objections to findings of fact numbers 8 & 12); (3) that communications between E-Systems and Hazeltine referenced in the proposed findings were "for the purpose of submitting a certified claim to the FAA under the Contract Disputes Act" (Record at 719-20, objections to findings of fact nos. 8, 9,

& 12); and (4) that the Disputes Clause of the Subcontract "was intended to work in concert with the disputes procedure of the prime contract." (Emphasis added.) Record at 723 (objection to finding of fact no. 22). All of the above findings, in one way or another, refer to the underlying intent of the parties with respect to resolving disputes under the Subcontract, and thereby undercut any basis for summary judgment under U.R.C.P 56(c) or dismissal pursuant to U.R.C.P. 12(b)(6). 4/

A. The Court Misconstrued the Subcontract Disputes Clause to Require that E-Systems' Claims Against Hazeltine in Utah Court Be Subject to the Administrative Appeals Process.

To those familiar with "Disputes" clauses typically used in government contracts, the Subcontract Disputes Clause does have a "complete, clear, and unambiguous meaning," but it is not the meaning adopted by the Court below. Specifically, the Court below misconstrued paragraph (a) of the Subcontract Disputes Clause, which reads:

> (a) Any dispute arising under this order which is not subject to appeal pursuant to subparagraphs (b) thru (e) below and which is not disposed of by agreement between Hazeltine

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4/ Lockhart Co. v. Equitable Realty, Inc., 657 P.2d 1333 (Utah 1983) (doubts, uncertainties or inferences concerning issues of fact must be construed "in a light most favorable to the party opposing summary judgment."); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982) (summary judgment is only granted if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law); Liquor Control Comm'n. v. Athas, 121 Utah 457, 243 P.2d 441, 443 (1952) (complaint does not fail to state claim under Rule 12(b)(6) unless defendant can show that plaintiff "would be entitled to no relief under any state of facts which could be proved in support of its claim."); Christensen v. Lelis Automatic Transmission Serv. Inc., 24 Utah 2d 165, 467 P.2d 605, 607 (1970) (same).

> and E-Systems shall be decided in any court of competent jurisdiction.

Unlike the run-of-the-mill arbitration provision which lumps together all manner of disputes and requires the parties to a contract to submit all such disputes to arbitration, 5/ this

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5/ Hazeltine argued below that the Subcontract's Disputes Clause is analogous to an arbitration clause and urged the Court to apply the same "public policy" considerations applicable to interpretation of arbitration clauses to determine whether E-Systems was bound by the Subcontract Disputes Clause to submit its claims first for consideration under the administrative appeals process. See Record at 407-12 (Hazeltine's Reply Brief at 9-14). Even if the Subcontract Disputes Clause can be compared to an arbitration clause -- an analogy that E-Systems rejects -- Hazeltine is wrong to suggest that "public policy" requires, or even favors, an overly-broad reading of the Subcontract Disputes Clause that would require E-Systems to process its disputes through an inapplicable administrative appeals procedure.

On the contrary, if "public policy" is at all applicable to the Court's interpretation of the Subcontract Disputes Clause, it would weigh against forcing E-Systems to relinquish its right to proceed in the Utah courts. Article I, Section 11 of the Utah Constitution provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

In accordance with the above provision, Utah courts will not refuse to exercise their jurisdiction "unless factors preponderate so strongly against trying the case [in Utah that to proceed] would work a great hardship on the defendant." See Summa Corp. v. Lancer Indus., Inc., 559 P.2d 544 (Utah 1977) (denying motion to dismiss based upon forum non conveniens); Mooney v. Denver & Rio Grande R.R. Co., 118 Utah 307, 221 P.2d 628 (Utah 1950) (discretion to close state court to plaintiff should not be exercised where underlying purpose is to stall or delay).

Hazeltine relied heavily on Lindon City v. Engineers Construction Co., 636 P.2d 1070 (Utah 1981) to support its argument

clause, as explained below, expressly applies only to certain types of disputes and contemplates that other disputes "shall be decided in any court of competent jurisdiction."

On the question of which disputes are subject to the administrative disputes procedure versus the judicial procedure, E-Systems reads paragraph (a) of the Subcontract Disputes Clause to modify the parties' common law right to resort to the courts only with respect to that subset of disputes "arising under this order." The Subcontract Disputes Clause is silent as to disputes not "arising under the order," and therefore does not purport to

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that the Subcontract Disputes Clause was tantamount to an arbitration clause under which E-Systems had waived its right to a judicial proceeding. Lindon City considered whether a state statute requiring arbitration of disputes violated Article I, Section 11 of the Utah Constitution, set forth above. Although the court in Lindon City identified an exception to Article I, Section 11 applicable when a party intentionally waives the ordinary and usual judicial remedy to which it is entitled under the Utah Constitution, the court stressed that such a waiver must be expressed in "the most unequivocal terms." Lindon City, 636 P.2d at 1074.

Even if the arbitration analogy were valid in this case -- which it is not -- it would be premature to apply the Lindon City "exception" to the right of a party to proceed expeditiously in Utah courts before determining what types of disputes E-Systems actually agreed to submit to the administrative disputes resolution process. As discussed below, the Subcontract Disputes Clause does not mandate that all disputes are subject to the administrative appeals procedure; some disputes "shall be decided by any court of competent jurisdiction." If E-Systems is correct that the claims raised in its complaint fall into the category of disputes that are subject to judicial resolution, E-Systems obviously will not have "unequivocally" waived its right to proceed immediately in the Utah courts on those claims.

alter E-Systems' state constitutional right to seek a judicial resolution of its disputes in the Utah courts. 6/

Disputes "arising under the order" that are also "subject to appeal pursuant to subparagraphs (b) thru (e)" of the Subcontract Disputes Clause will be handled under the administrative appeals procedure thereof. Conversely, disputes "arising under the order" that are not "subject to appeal . . . shall be decided by any court of competent jurisdiction."

As described more fully below, whether a dispute is subject to the administrative appeals procedure depends upon whether the parties have established contractually-prescribed remedies that are adequate to deal with the situation -- for example, a clause that allows for a day-for-day adjustment to the delivery schedule resulting from buyer imposed delays. In this sense, the administrative process presumes that the dispute does not rise to

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6/ Hazeltine argued below that "If E-Systems' argument is correct that the phrase 'arising under' is a limitation on the types of actions encompassed by this provision, the result of the argument is that actions that do not arise under the Subcontract may not be brought in a court." Record at 614-15 (Reply Brief at 11-12). Hazeltine then argues that "this Court need not apply such an illogical distinction between which actions that may and may not be brought in court." Id. Hazeltine's solution to what it disingenuously characterized as an "illogical" result was to simply pretend that the words "arising under the order" have no meaning or significance whatsoever.

E-Systems, however, never argued for the "illogical" interpretation of the Subcontract Disputes Clause suggested by Hazeltine. E-Systems did argue that the Subcontract Disputes Clause, by referring only to disputes "arising under the order," carves out only a subclass of disputes and modifies the usual disputes procedure at common law -- i.e., resort to the courts -- only for that subclass of disputes. For disputes not "arising under the order" the parties are free to pursue the usual judicial remedy. This interpretation is not "illogical."

the level of a breach of the contract, because the parties contemplated a situation in advance of contracting and established a contractual mechanism adequate to resolve the situation. When the contractually-prescribed remedies fail to adequately address the situation -- as they have in this case due to Hazeltine's outright repudiation of the Subcontract -- the administrative appeals process simply cannot apply.

1. The Subcontract Disputes Clause Does Not Govern the Claims Asserted by E-Systems Against Hazeltine in Utah Court Because That Clause Applies Only to That Subset of Disputes "Arising Under This Order."

Hazeltine convinced the Court below to adopt Hazeltine's overly-broad reading of subparagraph (a) of the Subcontract Disputes Clause, which completely overlooks the limiting phrase "arising under the order." 7/ It was contrary to the applicable rules of contract interpretation, however, for the Court to have accepted this interpretation of the clause because Hazeltine's interpretation intentionally fails to acknowledge or give meaning to the phrase "arising under this order," which, as discussed below, is a phrase that has a well-established meaning in the field

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7/ Hazeltine contends that this subparagraph of "[t]he Disputes Clause only permits disputes that are 'not subject to appeal' pursuant to the Disputes Clause to be decided by a court." Hazeltine's Motion to Dismiss at 9. "All other disputes," Hazeltine argues, "are required to be settled in accordance with the disputes resolution procedure set forth in the Disputes Clause." Id. This reading of Subcontract Disputes Clause reads out the phrase "arising under this order" which has a specialized meaning in the context of government contracting, and which was inserted by the parties for the express purpose of limiting the scope of the Subcontract Disputes Clause.

of government contracts. 8/ See, e.g., Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 266 (S.D.N.Y.), aff'd, 601 F.2d 609 (2d Cir. 1978) (New York law requires interpreting contract so as to "make every part of a contract effective"); Looney v. Great American Ins. Co., 71 F.R.D. 211, 214 (E.D.N.Y. 1976) ("construction which neutralizes any provision of a contract should never be adopted"); cf. Cornwall v. Willow Creek Country Club, 13 Utah 2d 160, 369 P.2d 928, 929 (1962) (Utah courts may not "add, ignore, or discard words in the process" of contract interpretation).

It is critically important, therefore, to understand the significance of the phrase "[a]ny dispute arising under this order" as used in paragraph (a) of the Subcontract Disputes Clause. The Subcontract Disputes Clause that E-Systems and Hazeltine agreed upon is a variation on the "standard" Disputes Clause which has long been used in virtually every government contract. Over the years, many of the terms and phrases used in this "standard" Disputes Clause, including the phrase "arising under the contract (or subcontract or order)" have come to have specialized meanings within the field of government contracts. Cf. Washington Metropolitan Area Trans. Auth. v. Buchart-Horn, Inc., 886 F.2d 733, 735 (4th Cir. 1989) (there is "considerable guidance in making that determination [as to which disputes fall within the Disputes

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8/ The Subcontract Disputes Clause provides that it shall be "governed by law of the state of New York." See Record at 345 (Complaint at Exhibit III, Contract, Clause No. XXXVIII, para. g.). Accordingly, New York law is cited, where appropriate, on points of contract law.

clause] for the Dispute clause 'is a standard feature of government contracts, and arguments concerning [its] scope and appropriate function are not novel,'" citing Rohr Industries v. WMATA, 720 F.2d 1319, 1322 (D.C. Cir. 1983)).

Disputes "arising under a contract" technically do not constitute breaches of the contract (which are sometimes referred to in government contract parlance as "disputes relating to a contract") because they fall within the general scope of the contract, are anticipated by the parties in advance of contracting, and are meant to be handled under special remedy-granting provisions within the contract. 9/ The Court's failure to consider this specialized meaning of the phrase "arising under this order," as it is used in the field of government contracts, in construing the meaning of the Subcontract Disputes Clause constitutes

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9/ Whether a change to the contract requirements constitutes a "breach" depends upon "what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." Freund v. United States, 260 U.S. 60, 63 (1922); Air-A-Plane Corp. v. United States, 187 Ct. Cl. 269, 275 (1969) ("The basic standard . . . is whether the modified job was essentially the same work the parties had bargained for when the contract was awarded. . . . [T]here is a cardinal change if the ordered deviations 'altered the nature of the thing to be constructed.'") E-Systems has alleged that, even though some of the individual changes required under the Subcontract may be susceptible to adjustment under the Subcontract Disputes Clause administrative appeals process, the cumulative number and sheer magnitude of the changes constitute a "cardinal change" or breach of the Subcontract which entitles E-Systems to sue Hazeltine for breach of Subcontract in "any court of competent jurisdiction." See, e.g., Edward R. Marden Corp. v. United States, 194 Ct. Cl. 799 (1971).

reversible error. 10/ See Restatement (Second) Contracts § 202 (technical terms and words of art are given their technical meaning when used in a transaction within their technical field).

The phrase "arising under this contract [or order]," when used in a Disputes Clause of a government contract or subcontract, has a restrictive meaning that is well-established in government contract law. United States v. Utah Construction & Mining Co., 384 U.S. 394, 407 (1966). In Utah Construction, the Court recognized the distinction between a true breach of contract and disputes "arising under [the] contract", i.e., a dispute for which there is a pre-established "contract adjustment provision" within the terms of the contract that will allow the parties to make an equitable adjustment for certain anticipated changes or situations. 384 U.S. at 401-02; see also Washington Metropolitan Area Trans. Auth., supra (a disputes clause "concerning a question of fact arising

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10/ Consideration of the way that the phrase "arising under the contract" is used in the field of government contracting is no different from consideration of evidence of "trade usage" in commercial contracting. Under New York law, evidence of trade usage is clearly not subject to the "parol evidence rule." See N.Y. Com. Code, §§ 1-205, 2-202 (McKinney 1964 & Supp. 1990) (Comment 1 (c) to § 2-202 "definitely rejects" the requirement that a court find the language of a contract ambiguous before evidence of trade usage may be introduced). In fact, the Uniform Commercial Code of New York "specifically requires the written language of the parties' agreement to be construed consistently with applicable trade usage." Federal Express Corp. v. Pan American World Airways, Inc., 623 F.2d 1297, 1302 (8th Cir. 1980) (citations omitted). By allowing evidence of course of dealing and trade usage, the court merely places the contract in the context in which it was executed. As aptly noted in Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971) (dispute over standby and subordination agreements), "[c]ertainly the parol evidence rule does not preclude evidence of the course of dealings or usage of trade, for such evidence merely delineates a commercial backdrop for intelligent interpretation of the agreement."

under this contract," . . . merely establish[es an] administrative procedure for resolving quarrels. Other contractual provisions, by granting a contract administrator authority to afford some remedy for the quarrel must in effect confer jurisdiction); Bethlehem Steel Corp. v. Grace Line, Inc., 416 F.2d 1096, 1102-03 (D.C. Cir. 1969) ("That phrase -- 'arising under this contract' -- has a lengthy history, throughout which it has commanded widespread acceptance as an unyielding limitation on administrative reference to disputes that can be fully remedied under some stipulation of contract . . . . [However, resort to the disputes clause procedure need not be made] unless [the claim] is subject to full administrative vindication under some other provision of the contracts.").

Hazeltine incorrectly asserted below that the advent of the Contract Disputes Act of 1978 ("CDA") rendered obsolete or "abolished" the well-established distinction between disputes "arising under" and disputes "related to" a contract (the latter constituting actions for breach). See Record at 610-12 (Hazeltine's Reply Memorandum at 7 - 9). Hazeltine's contention is untrue. 11/

11/ Prior to enactment of the CDA, the distinction between disputes "arising under" the contract and disputes involving breach of contract was determinative of the jurisdiction of the agency boards of contract appeal (these boards had jurisdiction to consider disputes "arising under" the contract, but could not consider breach of contract claims). The CDA, inter alia, expanded the jurisdiction of the agency boards of contract appeal to hear both kinds of disputes and this change was subsequently reflected in the standard government contracts disputes clause. The CDA also requires the contractor to submit all claims, including breach claims, to the government contracting officer for a final decision.

The specialized definitions of the phrases "arising under a contract" and "related to a contract," as used in the context of government contract law certainly have not been "abolished" by the CDA. In fact, the "arising under" versus "related to" distinction survives in the current version of FAR 52.233-1 "Disputes" (Apr. 1984), the Disputes Clause that is required by federal regulation to be used in virtually all government prime contracts. 12/ See FAR §§ 33.203 & 33.214 (text of FAR § 52.233-1 "Disputes" is contained in the Record at 707-08 (E-Systems' Supplemental Memorandum, Exhibit H)).

Government contractors still rely heavily on the "arising under" versus "related to" distinction in paragraph (h) of FAR § 52.233-1 Disputes, which sets forth the contractor's obligation to proceed with contract work pending a dispute. This paragraph states "[t]he Contractor shall proceed diligently with performance of the contract, pending final resolution of any request for relief, claim, or appeal or action arising under the contract, and

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Since the passage of the CDA, the nature of a dispute has been less frequently litigated (simply because both types of disputes are handled in essentially the same way and the boards of contract appeal no longer have to consider the nature of this dispute before asserting jurisdiction over the dispute). As discussed below, however, the distinction between the disputes "arising under" and disputes "relating to" a contract remains important.

12/ Hazeltine argued below that the FAA's alleged breach of Hazeltine's contract did not permit Hazeltine to "ignore the disputes resolution procedures of the prime contract." See Record at 644, (Hazeltine's Reply Brief at n.7). This argument conveniently overlooks the fact that the disputes provision in the FAA-Hazeltine contract expressly applies to "all disputes arising under or relating to" the contract, see Record at 710, while the Subcontract Disputes Clause only applies to "disputes arising under this order." In short, Hazeltine is comparing apples to oranges.

comply with any decision of the Contracting Officer." This language allows a contractor to stop work if the dispute involves a breach of contract by the Government. 13/

If the Government has a compelling need to require the Contractor to proceed even when the Government breaches the contract, then the FAR directs the use of "Alternate I" to the Disputes Clause. Alternate I simply modifies paragraph (h) of the Disputes Clause to require the Contractor to proceed pending final resolution of any dispute "arising under or related to" the

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13/ The official comments published with the final, post-CDA version of the Disputes Clause included the following:

> A major change from the regulations and interim Disputes clause, in use since March 1979, concerns the extent of the contractor's obligation to continue performance of work. Prior to the passage of the Contract Disputes Act, a contractor, pursuant to the Disputes clause then in effect, was in the event of a dispute arising under the contract, obligated to continue performance in accordance with the contracting officer's decision pending resolution of the dispute. On the other hand, if the dispute arose out of the contract, or in breach of the contract, there was no obligation to continue work. The interim Disputes clause expanded the contractor's obligation to continue performance to include disputes arising out of, or in breach of, the contract as well as under the contract. The final Disputes clause published here returns the situation to the pre-Contract Disputes Act obligation. Under the Disputes clause and the accompanying regulations, the contractor is obligated to continue work only if the dispute arises under the contract. It is recognized, however, that in unusual circumstances the performance of some contracts may be vital to the national security or public health and welfare so that performance must be guaranteed even in the event of a dispute arising out of, or in breach of, contract. In these unusual cases, procuring agencies may provide for a change to the Disputes clause to assure continuation of the work.

45 Fed. Reg. 31035 (May 9, 1980).

contract. Record at 706-08 (FAR 33.214 & FAR 52.233-1, Alternate I). Thus, the obligations placed on a government contractor vary significantly depending upon whether the Disputes Clause employs the phrase "arising under or related to" or simply "arising under the contract."

Despite its arguments to the contrary, this important distinction is not lost upon Hazeltine. The disputes provision in Hazeltine's contract with the FAA does not invoke "Alternate I," but only requires Hazeltine to "proceed diligently" with contract performance pending resolution of disputes arising under the FAA contract. See Record at 688, 710 (E-Systems' Supplemental Brief at 5 & Exhibit I). Faced with what it considered to be a no-win situation under the prime contract, Hazeltine has attempted to invoke its right to stop work under the prime contract by arguing that the FAA breached the contract so as to relieve Hazeltine of its obligation to proceed under the Disputes Clause. See Record at 674 (Hazeltine's Reply Brief at Exhibit A, Complaint in Hazeltine v. United States at ¶ 183). Given Hazeltine's position vis-a-vis the FAA, where Hazeltine is asserting that it does not have to proceed with work on the prime contract because its dispute with the FAA does not "arise under the contract," it is remarkable that Hazeltine would even suggest that the distinction between disputes "arising under" a contract and disputes "related to" a contract has been "abolished" for the purposes of government contract law.

In sum, if the object of the parties was to draft the Subcontract Disputes Clause to govern breaches of the Subcontract, they needed only to invoke the phrase "arising under or related to the order" in place of the phrase that, in fact, was agreed upon -- "arising under this order." As a consequence of the parties' choice of the more restrictive phrase "arising under the order" in lieu of the all-inclusive phrase "arising under or relating to the order," E-Systems' claims based upon breach of the Subcontract are simply not subject to the administrative appeals procedure set forth in the Subcontract Disputes Clause.

2. E-Systems, in the Alternative, Raised the Possibility of More Than One Reasonable Interpretation of the Subcontract Disputes Clause, Thereby Precluding Application of the Parol Evidence Rule.

The interpretation of the clause explained in the preceding section is obviously not the same interpretation adopted by the Court below, but it is a reasonable one. At the very least, then, the parties' use of the phrase "arising under the order" to modify "any disputes" in paragraph (a) of the Subcontract Disputes Clause raises the possibility of more than one reasonable interpretation of the Subcontract Disputes Clause, i.e., an ambiguity. See Walk-In Medical Centers, Inc. v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987) (Under New York law, "[a]n 'ambiguous' word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as

generally understood in the particular trade or business," quoting Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968)); IBM Poughkeepsie Employees Federal Credit Union v. Cumis Insurance Society, Inc., 590 F. Supp. 769, 772 (S.D.N.Y. 1984) (if contract term is susceptible to "at least two fairly reasonable meanings," then parol evidence is permitted).

By failing to acknowledge even this much, the Court below compounded its error by failing to consider all evidence that E-Systems proffered regarding the intent of the parties with respect to the scope of the Subcontract Disputes Clause. There is no question that E-Systems submitted evidence sufficient to raise a material issue of fact regarding whether the phrase "arising under this order" was used intentionally by the parties for the express purpose of limiting the application of the Subcontract Disputes Clause. See, e.g., Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975) (only one sworn statement is necessary to dispute averments on the other side and to preclude summary judgment).

As evidence supporting its contention that the Subcontract Disputes Clause was crafted to apply only to disputes falling short of breaches of the Subcontract (i.e., only disputes "arising under the order"), E-Systems introduced affidavits of two of its employees, Gary L. Hopkins, Associate General Counsel for E-Systems, and Rodger M. Brimhall, E-Systems' Senior Contracts Administrator, both of whom actually participated in the negotiations with Hazeltine over the wording of the Subcontract Disputes Clause. Both men attested to the fact that the language

ultimately agreed upon indeed was intended to restrict the application of the disputes resolution procedure to only those disputes "arising under the order" as that phrase is customarily applied in the context of government contracting.

Mr. Hopkins' affidavit states:

> The disputes article was structured to cover those claims "arising under" the subcontract as that terminology is used in Federal contracting. Further, with respect to such claims, namely those arising under the contract, only those claims caused by some direction, change or other action of the Federal Aviation Administration (FAA) through Hazeltine to E-Systems were to be subject to the applicable provisions outlined in subparagraphs (b) through (e) of ARTICLE XXXVIII.

See Record at 579-80, Affidavit of Gary L. Hopkins, Brief in Opposition at Exhibit B at paragraph 3.

Mr Brimhall's affidavit corroborates E-Systems' interpretation of the Subcontract Disputes Clause:

> During negotiations over the subcontract, an issue arose regarding the scope of Hazeltine's proposed "Disputes" clause. That issue was ultimately resolved by Hazeltine's and E-Systems' agreement to use a non-standard disputes clause that was intended to set up a procedure for the resolution of disputes "arising under" the subcontract, as that phrase is applied in traditional government contracts. Subcontract K25213, Art. XXXVIII (a). All other disputes between E-Systems and Hazeltine were not intended to be subject to the government contracts appeals procedure and could be asserted as claims in "any court of competent jurisdiction." Id.

See Record at 553 (E-Systems' Brief in Opposition, Exhibit A, Affidavit of Rodger M. Brimhall, at paragraph 5). In sum, both Mr. Hopkins and Mr. Brimhall recall that Hazeltine and E-Systems used the phrase "arising under" the Subcontract to limit scope of disputes subject to the administrative appeals procedure.

As is demonstrated above, these recollections are entirely consistent with the way that the phrase "arising under" the contract or subcontract is typically used, and continues to be used, in disputes provisions in government contracting. Moreover, had E-Systems been provided with even a limited opportunity to conduct discovery in this case, it is certain that E-Systems could have provided even more support for its contention that E-Systems and Hazeltine, both experienced government contractors, intended to use those "terms of art" in a manner consistent with their understanding of those terms in the context of government contract law.

3. The E-Systems' Claims Do Not "Arise Under" the Subcontract Because the Remedy-Granting Provisions in the Subcontract Cannot Adequately Address Those Claims.

a. The Subcontract's Remedy-Granting Provisions Are Very Limited in Scope.

The claims asserted by E-Systems in Utah court are breach claims that do not "arise under the order" because they clearly are not susceptible to complete relief under any "remedy-granting" clause in the Subcontract. While E-Systems concedes that there are remedy-granting clauses in the Subcontract, including the "Changes" clause (see Record at 305, Subcontract K25213, Standard Form 32, Clause No. 2), the "equitable adjustments" contemplated by that clause only extend to Government-directed, in-scope changes to the specifications, changes in place of delivery or method of shipment. It is patently evident that E-Systems' allegations of out-of-scope changes to the Subcontract requirements, bad faith and

breach of contract relating both to the Subcontract and the Teaming Agreement are far broader than the limited types of matters that reasonably can be addressed by this narrowly drawn clause or the remedies available under that or other Subcontract clauses.

The "Termination for Convenience" clause in the Subcontract also fails to address in a meaningful way E-Systems' claims for breach of the Subcontract and the Teaming Agreement. Like the "Changes" clause, the "Termination for Convenience" clause has a limited purpose and it cannot be used by a prime contractor as an all-purpose shield against subcontractor claims for breach of Subcontract. See, e.g., Rogerson Aircraft Corp. v. Fairchild Indus., Inc., 632 F. Supp. 1494 (C.D. Cal. 1986) (applying New York law to allow breach damages for anticipatory lost profits relating to a sales contract to supply aircraft parts notwithstanding fact that contract contained a termination for convenience clause). In Rogerson Aircraft, the court held that the termination provisions of the contract were structured to "force Fairchild to elect either to terminate . . . the contract for its convenience . . . thereby requiring a speedy close-out of the contract and the payment of Rogerson's termination costs and settlement expenses . . . or to terminate the contract for default." 632 F. Supp. at 1499. The court held that Fairchild's wrongful termination for default constituted a breach of the contract and prevented Fairchild from limiting damages to those available under the termination for convenience clause. Id. (citing Klein v. United States, 285 F.2d 778 (Ct. Cl. 1961)). Similarly, Hazeltine has abused any rights

it had under the Termination for Convenience clause by failing -- for nearly two years -- to provide for the "speedy close-out of the contract and the payment of [E-Systems'] termination costs and settlement expenses" under the Subcontract. Consequently, E-Systems right to recovery against Hazeltine cannot be limited only to that which E-Systems would have obtained under that clause.

b. E-Systems Is Entitled to Recover Damages for Breach of the Subcontract and the Teaming Agreement That Are Unavailable Under Any Remedy-Granting Provision of the Subcontract.

Under generally accepted principles of contract law and New York contract law in particular, E-Systems is entitled to recover its "reliance damages" for Hazeltine's breach of the Subcontract and the Teaming Agreement. Reliance damages are damages for amounts which plaintiff "has been induced to expend on the faith of the contract, including a fair allowance for his own time and services." United States v. Behan, 110 U.S. 338, 345 (1884). Reliance damages encompass any expenditures made on the part of the plaintiff "in 'essential reliance' upon defendant's promise," Gruber v. S-M News Co., 126 F. Supp. 442, 446 (S.D.N.Y 1954), including expenditures in preparation for and partial performance of the contract. See, e.g., Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 357 N.Y.S.2d 857, 860 (1974); see also Restatement (Second) of Contracts § 349 (1981) (reasonable expenditures in necessary preparation or partial performance of contract recoverable); 5 Corbin on Contracts § 1031 (1964 & Supp.

1990) ("[e]xpenditures in preparation and part performance are recoverable as an alternative means of gains prevented"). 14/

E-Systems was induced to spend substantial sums in essential reliance upon Hazeltine's broken promises made under both the Subcontract and the Teaming Agreement -- amounts which cannot be recovered in an administrative appeal to the FAA. E-Systems has expended approximately $11,579,000 in contract design and development, $893,000 in building 10 DME/P first article units; $6,167,000 in building production DME/P systems and related spares. Due to Hazeltine's abandonment of the Subcontract, these costs might not be recovered if Hazeltine is unsuccessful in litigation against the FAA over the propriety of the default termination.

Other costs that E-Systems expended in reliance on Hazeltine's good faith performance of the Subcontract and Teaming Agreement that cannot be recovered through an administrative appeal even if Hazeltine succeeds at overturning its default termination, including $1,125,000 in pre-contract development costs, $2,318,000 in company-funded design and development, $680,000 in unabsorbed burden/overhead, $231,000 in attorneys fees, and additional intra-company expenses associated with E-Systems' attempts to work its way out of the problems that Hazeltine created by its outright repudiation of the Subcontract.

14/Additionally, if the Court finds, as the facts indicate, that Hazeltine acted in bad faith, Hazeltine will be estopped from asserting any contractual limitation on consequential damages, and E-Systems will be entitled to recover lost profits as well. See, e.g., Long Island Lighting Co. v. Transamerica Selaval, 646 F. Supp. 1442, 1458 (S.D.N.Y. 1986) and cases cited therein.

Moreover, because Hazeltine has failed to properly terminate and close out the contract, E-Systems has been forced to absorb the carrying cost of the entire Subcontract inventory for a period approaching two years. This interest expense is $2,675,000 and growing, and it is not recoverable from the Government under the termination for convenience that Hazeltine now seeks in U.S. Claims Court. See, e.g., United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947) (interest may not be assessed against the government unless permitted by statute or contract provision); FAR 31.205-20 "Interest and other financial costs" (interest unallowable cost under government contracts); FAR 31.205-42 "Termination costs" (cost principles in FAR Subpart 31.2 applicable to termination situations).

Consequently, if E-Systems were to pursue the administrative appeals process and seek reimbursement under the remedy-granting clauses of the Subcontract, any remedy under such clauses clearly would be insufficient to address E-Systems' damages for breach of Subcontract and Teaming Agreement. Because E-Systems has alleged both a breach of the Subcontract and breach of the Teaming Agreement and can demonstrate its breach damages are unavailable under the any remedy-granting clause in the Subcontract, the Court below was incorrect to require E-Systems to first pursue an administrative remedy prior to seeking relief in the Utah court.

E-Systems is clearly entitled to recover all its reliance damages resulting from Hazeltine's abandonment of the Subcontract and Teaming Agreement not just those that are theoretically

"available" under the remedy-granting provisions of the Subcontract. As the Court said in United States v. Behan, 110 U.S. 338 (1884):

> It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services) . . . .

Id. at 345. As the Behan Court further stated, "the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of contract for which an action will lie for the recovery of all damages which the injured party sustained." Id. at 346 (emphasis added); see also Polyglycoat v. C.P.C. Distributors, Inc., 534 F. Supp. 200, 203 n.3 (S.D.N.Y. 1982) (plaintiff entitled to recover sums spent advertising products in reliance upon subsequently breached contract); Mefer S.A.R.L. of Paris v. Naviagro Maritime, 533 F. Supp. 337, 347 (S.D.N.Y. 1982) (plaintiff entitled to recover "foreseeable losses and expenses" incurred as a result of defendant's breach).

In sum, Hazeltine has improperly invoked the Subcontract Disputes Clause to further delay E-Systems' recovery of the sums that E-Systems expended in reliance upon Hazeltine's broken promises under the Subcontract and Teaming Agreement. By accepting Hazeltine's overly-broad interpretation of the Subcontract Disputes Clause, the Court below not only misapplied the Subcontract Disputes Clause, it inadvertently abetted Hazeltine's delaying tactics by wrongly directing E-Systems to pursue an administrative

remedy that was both inapplicable and incapable of providing E-Systems complete relief.

4. Even Under Hazeltine's Interpretation of the Subcontract Disputes Clause, the Claims Asserted By E-Systems Against Hazeltine Are Not "Subject to Appeal" Under the Administrative Appeals Procedure.

Putting aside the question of whether the clause only modifies E-Systems' right to resort to the Utah courts for disputes "arising under the order," the Court's rulings below cannot even be supported based upon Hazeltine's proffered interpretation of the Subcontract Disputes Clause. Hazeltine ignores the phrase "arising under the order" and reads paragraph (a) of the Subcontract Disputes Clause to mean that only those claims "not subject to appeal . . . shall be heard by any court of competent jurisdiction." See Record 407 (Hazeltine's Brief at 9) (emphasis added).

In adopting Hazeltine's interpretation of the Subcontract Disputes Clause, the Court erred by failing to examine each of E-Systems' claims to determine whether those claims were, in fact, actually "subject to appeal" to the FAA Contracting Officer. Since the FAA Contracting Officer only has authority to rule on disputes resulting from FAA action, the Court below should have determined whether the claims asserted by E-Systems in Utah court resulted from FAA action. This is a question that is not capable of determination as a matter of law.

The administrative appeals process set forth in paragraphs (b) through (e) of the Subcontract Disputes Clause anticipates that the FAA Contracting Officer will issue a final decision on the

merits of the dispute which, in turn, may be appealed to either the Department of Transportation Board of Contract Appeals ("DOTBCA") or the U.S. Claims Court, the category of disputes that are "subject to appeal" necessarily can be no broader than the authority of the FAA Contracting Officer to render such decisions or the DOTBCA's or U.S. Claims Court's jurisdiction to consider related appeals.

The applicable section of the federal regulations circumscribing the Contracting Officer's ability to render final decisions on disputes involving subcontractors, set forth at FAR 44.203 (c), reads as follows:

> Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor's behalf. This clause may also provide that the prime contractor and the subcontractor shall be equally bound by the contracting officer's or board's decision. The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at § 53.233-1, Disputes.

The above regulation clearly limits the types of disputes "subject to appeal." In fact, the Subcontract may not purport to require the Contracting Officer to render decisions on any prime contractor/subcontractor disputes unless that dispute "arise[s] between the Government and the prime contractor," i.e., stems from government action which affects the contractor or results from a

dispute between the prime contractor and the government. 15/ Cf. Grumman Ohio Corp. v. Dole, 776 F.2d 338 (D.C. Cir. 1985) (incorporation of the standard government disputes clause in subcontract does not impose on the Urban Mass Transportation Administration any obligation to provide a forum for disputes involving a contract to which it is not a party; "it makes no sense whatever in the real world to force UMTA to preside over battles in which the federal interests are minimal at best.").

Although E-Systems' claims for recurring and nonrecurring costs under the Subcontract, in the main, resulted from direction of the FAA and are arguably "subject to appeal" in the sense that they are claims for which the FAA may ultimately be liable, 16/ E-Systems has leveled allegations of specific acts of bad faith and breach of contract by Hazeltine that cannot, in good faith, reasonably be attributed to the direction of the FAA. For such claims, resort to the administrative appeals procedure, which entails E-Systems seeking recovery from the FAA, would serve no

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15/ Likewise, the U.S. Claims Court has no jurisdiction to consider such prime contractor/subcontractor disputes. Cf. Rolls-Royce, Ltd., Derby, England v. United States, 364 F.2d 415 (Ct. Cl. 1966) (Claims Court lacked jurisdiction over breach of contract counterclaim by third party intervenor against private plaintiff, even though the counterclaim involved common questions of fact, because it did not seek to enforce a claim that was part of the plaintiff's original action against the United States).

16/ As previously noted, however, the cumulative effect of the changes went far beyond the original scope of the Subcontract and thereby constitute a cardinal change to, and thus a breach of, the Subcontract. See, e.g., Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180 (1965). As explained above, E-Systems is entitled, under the Subcontract Disputes Clause, to have its breach claims heard in "any court of competent jurisdiction."

purpose other than to delay E-Systems' recovery from Hazeltine for its valid claims against Hazeltine.

Perhaps the clearest indication of error on the part of the Court below was its failure to recognize E-Systems' right to proceed against Hazeltine in Utah court to recover that portion of E-Systems' two separate claims for nonrecurring and recurring costs which Hazeltine refused to certify and submit to the Contracting Officer pursuant to subparagraphs (b) through (e) of the Subcontract Disputes Clause. Even Hazeltine was not prepared to certify to the FAA that portion of the claim was "subject to appeal."

Other clear examples of disputes "not subject to appeal" are E-Systems' claims relating to Hazeltine's breach of the Teaming Agreements, dated December 7, 1982 and December 21, 1987. These Teaming Agreements are independent contracts that have no disputes clause, do not contain any other provision purporting to require that disputes relating to the Teaming Agreement be resolved in any predetermined manner, and do not expressly or impliedly incorporate the Subcontract Disputes Clause. 17/

17/ Hazeltine has argued that E-Systems' claims based upon breach of the Teaming Agreements should be dismissed because, "although [these] counts are superficially based on the 1985 Teaming Agreement, they specifically related to claims arising under the Subcontract." See Record at 412 (Hazeltine's Brief in Support of Motion to Dismiss at 14, n.2) E-Systems has alleged that its incurred significant expenses, including over $1 million in pre-contract design and development expenses, in reliance on Hazeltine's promises under the Teaming Agreement. This claim is not "superficially" based upon any claim "arising under" the Subcontract.

B. The Trial Court Erred in Concluding, As a Matter of Law, That the Subcontract Disputes Clause Had Not Failed of Its Essential Purpose Because That Determination Inherently Involves Questions of Fact.

Even if the Subcontract Disputes Clause can reasonably be read to apply to the claims raised by E-Systems below, the court below was incorrect to force E-Systems to pursue an administrative appeal with the FAA because the Subcontract Disputes Clause has "failed of its essential purpose," which is to allow for an expeditious administrative disposition of those disputes "arising under the order" in the course of Subcontract performance. Cf. United States v. Triple A Machine Shop, Inc., 857 F.2d 579 (9th Cir. 1988) (disputes clause presupposes an on-going contractual relationship and specific contractual remedies). 18/

The New York contract law doctrine of "failure of essential purpose" relieves a party from pursuing an otherwise exclusive or limited remedy if the circumstances existing at the time of the agreement have changed to such a degree that the enforcement of the remedy would deprive the plaintiff of a substantial benefit of that remedy. 19/ In such cases, the limited remedy is simply

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18/ It is irrelevant that the disputes clause survives "completion."

19/ Under government contract law, a similar exception to the contractor's obligation to proceed under the Disputes clause exists where the contractor alleges that the government has essentially deprived the contractor of the administrative appeals process. See J.A. Jones Construction Co. v. City of Dover v. General Electric Co., 372 A.2d 540 (Del. Super. 1977); Patton Wrecking & Demolition Co. v. Tennessee Valley Authority, 465 F.2d 1073 (5th Cir. 1972) ("It may be that the contracting officer . . . so clearly reveals an unwillingness to act to comply with the administrative procedures in the contract that the contractor or supplier is justified in concluding that the procedures thereby

disregarded and the full arsenal of breach remedies becomes available to the plaintiff. See, e.g., Computerized Radiological Services, Inc. v. Syntex Corp., 595 F. Supp. 1495, 1510 (E.D.N.Y. 1984), aff'd in part and rev'd in part, 768 F.2d 72 (2d Cir. 1986), citing Wilson Trading Corp. v. David Ferguson Ltd., 23 N.Y.2d 398, 404-05, 244 N.E.2d 685, 688, 97 N.Y.S.2d 108, 113 (1968).

There is no question that Hazeltine's bad faith acts work to deny E-Systems a substantial benefit of the administrative appeals process. 20/ The paramount impediment to E-Systems' recovery under the administrative appeals process stems from Hazeltine's election to stop work under the prime contract -- a decision which directly precipitated the FAA's termination for default of the prime

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have become 'unavailable'.") Cf. Rohr Industries, 720 F.2d at 1323 (contractor's claim for breach of contract based upon failure to comply with disputes clause did not have to be processed through disputes clause procedure).

20/ Hazeltine's bad faith conduct alone precludes it from asserting any rights under the Subcontract Disputes Clause even if that clause does not "fail of its essential purpose" because "'persons invoking the aid of contracts are under an implied obligation to exercise good faith not to frustrate the contracts into which they have entered.'" See Lowell v. Twin Disc, Inc., 527 F.2d 767 (2d Cir. 1975) (citing Grad v. Roberts, 14 N.Y.2d 70, 75, 248 N.Y.S.2d 633, 637, 198 N.E.2d 26, 28 (1964)). E-Systems has alleged facts sufficient to make a prima facie claim that Hazeltine has breached the implied covenant of good faith and fair dealing of both the Subcontract and the Teaming Agreement. This covenant of good faith and fair dealing, which is present in all contracts, is a promise not to act so as to deprive the other party of the benefits of the contract. See, e.g., Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 104 N.E. 163 (1933). Hazeltine's willful deviation from the terms of the Subcontract, therefore, should preclude it from attempting to enforce any provision in that Subcontract. See, e.g., Filner v. Shapiro, 633 F.2d 139 (2d Cir. 1980) (applying New York law to preclude application of doctrine of substantial performance due to willful breach of contract by defendant).

contract. Although Hazeltine is attempting in the U.S. Claims Court to have the termination for default converted into a termination for convenience, until this is accomplished the administrative appeals procedure is essentially foreclosed. 21/ With only a few exceptions, a contractor is not entitled to payment for undelivered work under a defaulted contract. See, e.g., Jules Teitelbaum, Trustee in Bankruptcy for Victory Electronics, Inc., ASBCA No. 12885, 70-1 BCA ¶ 8210 at 38,164, 38,175 (defaulted contractor not entitled to equitable adjustment for additional testing of radio sets because the testing was incomplete and undelivered at time of default termination); Tuff-Kote Dinol, J.D. Partiridge, Inc., ASBCA Nos. 28961, 30058, 87-3 BCA ¶ 20,042 at 101,462--101,463 ("general rule is that where a contract has been properly terminated for default, no recovery may be had for the expenses of either changed or unchanged work incurred prior to termination with respect to undelivered supplies or services").

Hazeltine argued below that if it is successful in convincing the U.S. Claims Court to reverse the FAA's decision to terminate the prime contract for default, E-Systems then may avail itself of the administrative appeals process. Record at 617. If it is not

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21/ Hazeltine argued below that E-Systems should not be allowed to disregard the administrative appeals process because it would expose Hazeltine to the "disastrous" possibility of inconsistent judgments. [cites] E-Systems has the right to prove breach of the Subcontract by Hazeltine and to recover its damages from Hazeltine. If Hazeltine can prove that its breach of the Subcontract resulted from FAA actions and, in turn, recover from the FAA, then that is good for Hazeltine. If it cannot recover from the FAA, however, E-Systems is still entitled to compensation from Hazeltine for Hazeltine's breach of the Subcontract. In short there is no real possibility of "inconsistent judgments."

successful, E-Systems can later file suit against Hazeltine in the Utah courts and later seek the same remedy it seeks now. 22/ Given these alternatives, Hazeltine disingenuously suggests that E-Systems' rights under the disputes clause are "not affected at all." Id. The point of the doctrine of "failure of essential purpose," however, must relate to the actual intent of the parties regarding the purpose of the clause, and in this case the purpose of the clause was to provide an expeditious remedy in the context of an on-going contractual relationship. No matter what the outcome of Hazeltine's litigation in U.S. Claims Court, that purpose has been frustrated.

Under the doctrine of frustration of essential purpose, the central question is whether "'an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, as a result of later circumstances operates to deprive a party of a substantial benefit,'" and under New York law a substantial delay in supplying a remedy can just as effectively deny the benefit of a remedy as a total inability to provide the remedy. See, e.g., Cayuga Harvester v. Allis-Chalmers Corporation, 465 N.Y.S.2d 606, 611, 95 A.D.2d 5 (N.Y. App. Div. 1983).

Whether Hazeltine's actions deprived E-Systems of a substantial benefit of its agreement is a question of fact which precludes summary judgment. In Cayuga Harvester, the court

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22/ It may take several years before the U.S. Claims Court renders a decision on Hazeltine's action against the FAA. Hazeltine overlooks the fact that the statute of limitations may bar subsequent action by E-Systems at that time.

reversed a summary judgment on the issue of whether a "repair or replace" remedy clause failed of its essential purpose. The court stated, "ordinarily, whether circumstances have caused a 'limited remedy to fail of its essential purpose' is a question of fact for the jury and one necessarily to be resolved when proof of the circumstances occurring after the contract is formed." The court held that the plaintiff's allegations of delay constituted a prima facie showing that the remedy clause failed of its essential purpose, even absent bad faith or wilfully dilatory conduct on the part of the defendant. Cayuga Harvester, 465 N.Y.S.2d at 611-12; see also Erie County Water Auth. v. Hen-Gar Constr. Corp., 473 F. Supp. 1315 (W.D.N.Y. 1979) (New York failure of essential purpose doctrine depends upon whether party is deprived of the substantial value of its bargain; this is a question of fact which precludes summary judgment).

Hazeltine cannot dispute the fact that its termination for default imposes a substantial delay on the administrative process. If Hazeltine is not successful in reversing the termination for default, it will possibly foreclose the administrative appeals process altogether. Even if Hazeltine is ultimately successful in reversing its termination for default, however, E-Systems still may not obtain any benefit from the administrative appeals process because the FAA had raised affirmative defenses against Hazeltine that, if successful, may bar any recovery by E-Systems. See Record at 664 (Defendants' Answer to Plaintiff's First Amended Complaint, filed October 20, 1989, at para. 189, Hazeltine Corp. v. United

States, No. 425-89C (Cl. Ct. Aug. 9, 1989) (FAA asserts that Hazeltine's claims against the FAA are barred by estoppel, waiver, release, or accord and satisfaction)).

In light of Hazeltine's absolute repudiation of the Subcontract, Hazeltine's termination for default, and the FAA's claim to affirmative defenses against any claims asserted by Hazeltine, the administrative appeals process that "may have appeared fair and reasonable at the inception of the contract" certainly no longer appears fair and reasonable. At a minimum, the Court below erred in failing to allow E-Systems to show, as a factual matter, that Hazeltine's bad faith conduct had made the remedy too difficult to achieve. See Tareyton Electronic Composition, Inc. v. Eltra Corp., 21 U.C.C. Rep. 1064 (M.D.N.C. 1977) (New York law precludes summary judgment where party alleging breach of contract is seeking to avoid the exclusive or limited remedy; plaintiff entitled to show the defendant's own bad faith act that precludes recovery under that limited remedy).

C. The Trial Court Improperly Denied E-Systems Its Rightful Choice of Forum by Failing to Consider a Stay of E-Systems' Action Pending the Determination Under the Administrative Appeals Procedure.

The Court below dismissed E-Systems' claims for breach of the Subcontract and Teaming Agreement because in the Court's view E-Systems had not complied with the administrative appeals procedure of the Subcontract Disputes Clause. See Conclusion of Law No. 4. ("Exhaustion of the appeal procedure . . . is a condition precedent to initiation by E-Systems of this litigation against Hazeltine."). E-Systems is unable to submit its claims against Hazeltine to the

FAA for determination under the administrative appeals procedure because such an appeal would require that E-Systems certify that "the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable." See Federal Acquisition Regulation 33.207. Pending this appeal, however, E-Systems has submitted to the FAA its claims for recurring and non-recurring costs based upon FAA-directed changes to the Subcontract, and these claims are currently pending in the U.S. Claims Court. Even if E-Systems recovers on these claims, however, E-Systems will not be made whole for Hazeltine's breach of the Subcontract and Teaming Agreement.

Whether this Court decides that E-Systems should first proceed with all or part of its claims through the administrative appeal procedure, E-Systems should be allowed to retain its choice of forum in the Third Judicial Court of Salt Lake County for all claims not resolved by the administrative appeals procedure. Pursuant to Rule 30(a) of the Utah Rules of Appellate Procedure, this Court may "modify or otherwise dispose of any order of judgment appealed from." This matter should be reversed and allowed to proceed in the Third Judicial District Court. However, in the event that this Court affirms the decision of the trial court, the trial court's order should be modified to stay the present action by E-Systems in order to preserve E-Systems' choice of forum pending the resolution of any administrative appeal.

VIII. CONCLUSION

Instead of allowing E-Systems to proceed with its breach of contract action in the Utah courts, the Court below misconstrued a "Disputes" clause in the Subcontract to require that E-Systems pursue an administrative appeal to seek recovery for its breach of contract damages from the FAA as a prerequisite to E-Systems' instituting an action against Hazeltine in the Utah courts. There is absolutely no basis under the express terms of the Subcontract, or under any other legal principle, for this conclusion.

First, the Disputes clause in question expressly does not apply to breaches of the Subcontract. Second, even if it did purport to cover such claims, E-Systems' claims in the Utah court concern its dispute with Hazeltine, not any dispute between the FAA and Hazeltine that, in turn, affects the Subcontract. Under the New York contract law which governs the Subcontract, E-Systems is entitled to reliance damages for breach of the Subcontract and the Teaming Agreement including pre-contract development costs, inventory carrying costs, and other damages not otherwise recoverable from the FAA. This remedy is unavailable under the administrative procedure contemplated in the Disputes clause. It makes no sense to force E-Systems to go through the motions of complying with an administrative disputes process that E-Systems can now show will be insufficient to remedy its claims against Hazeltine. Finally, E-Systems has a right to a forum in the Utah courts, a right that may be unjustifiably thwarted in the

subsequent "race to the courthouse" after the futile administrative appeal is exhausted.

Accordingly, the lower Court's holding should be reversed and its order granting Hazeltine's motion to dismiss and, in the alternative, motion for summary judgment should be vacated by this Court. The Court should remand with instructions to allow E-Systems to proceed with its lawsuit or, alternatively, with instructions to stay E-Systems' suit pending exhaustion of the administrative appeal to the FAA Contracting Officer.

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DATE: October 17, 1990

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 1990, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was hand-delivered to the following:

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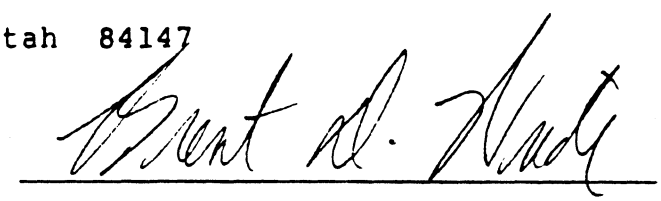

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